Webco Industries *and* United Steelworkers of America. Case 17–CA–19898

July 19, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

On September 17, 1999, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.

1. The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off or terminating a number of employees because of their support of the Union. We agree with the judge's findings except with regard to Charley Casey.[3] Contrary to the judge, we find that the General Counsel failed to establish that Casey's union activities were a motivating factor in the Respondent's decision to lay him off.

As the judge found, there is no direct evidence that the Respondent knew that Casey supported the Union. Casey's only union activities consisted of signing a union card and attending one union meeting, and there is no showing that the Respondent was aware of either.

The judge, however, inferred from other circumstances that the Respondent laid Casey off because of his support of the Union. Thus, the judge noted that in 1996, Casey's supervisor attempted to have him terminated for inadequate job performance, which was apparently due in part to Casey's difficulties in reading. Bill Weber, the Respondent's founder and CEO, intervened on Casey's behalf and prevented his termination, on the condition that he upgrade his reading and writing skills by working with a private tutor paid for by the Respondent. Casey dropped out of the program after 2 months without achieving its objective, but nonetheless continued to work, with Weber's permission, until he was laid off as part of a reduction in force for economic reasons in October 1998. The judge found that "animosity toward the Union trumped any personal relationship" between Casey and Weber. He reasoned that Weber condoned Casey's failure to improve his skills and therefore could not later rely on that failure as an excuse to discharge him.

The judge's reasoning cannot withstand scrutiny. As the judge conceded, there is no direct evidence that the

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's finding that Supervisor Jene Harmon unlawfully interrogated Gary Schooley concerning his union views, we disavow the judge's suggestion that interrogations of open union supporters are necessarily coercive. Contrary to the judge, neither the majority opinion nor Member Brame's concurrence in *Randell Warehouse of Arizona,* 328 NLRB 1034 (1999), remanded 252 F.3d 445 (D.C. Cir. 2001), supports that proposition. We find, under all the circumstances of this case set forth by the judge, and especially the Respondent's previous unfair labor practices, that Harmon's interrogation of Schooley was coercive.

[3] In finding the 8(a)(3) violations, the judge stated that, under *Wright Line*, 251 NLRB 1083 (1980), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that the employees' protected activities were a motivating factor in the Respondent's decisions to lay them off or terminate them. Although it has sometimes phrased the General Counsel's burden in terms of establishing a prima facie case, the Board has made clear that, under *Wright Line*, the General Counsel must establish that the employees' protected conduct was, *in fact*, a motivating factor in the Respondent's decision. See, e.g., *Manno Electric,* 321 NLRB 278, 280 fn. 12 (1996). We find, however, that the General Counsel clearly carried that burden in this case.

The judge also stated that, if the General Counsel carries his initial burden, the burden shifts to the Respondent to demonstrate that it would have taken the same actions against the employees even in the absence of their protected activities and that, if the Respondent goes forward with such evidence, the General Counsel is required to rebut that evidence by demonstrating that the discrimination would not have taken place except for the employees' protected activities. That statement is incorrect. *Wright Line* clearly states that, if the General Counsel carries his initial burden, the burden shifts to the Respondent to demonstrate that it would have taken the same actions even absent the employees' protected activities; it is not the General Counsel's burden to prove the opposite. 251 NLRB at 1089. The Respondent's burden thus is that of establishing an affirmative defense, for which it has the burden of persuasion. Id. at 1088 fn. 11; *Manno Electric*, 321 NLRB at 280 fn. 12. This allocation of burdens was explicitly approved by the Supreme Court in *NLRB v. Transportation Management Corp*., supra at 400–403; see also *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994).

Although the judge misstated the parties' respective burdens, he found that the Respondent had failed to rebut the General Counsel's case. Thus, the judge correctly required the Respondent to prove that it would have taken the actions it did regardless of the employees' union activities, and he found that it had failed to do so. We agree.

In affirming the judge's findings, we note that Charlie Williams and Shawn Wilson were among the employees identified as union supporters in management meetings in which employees were selected for layoff.

Respondent was aware of Casey's support of the Union. And we do not think such awareness may be inferred simply from the fact that the Respondent laid Casey off in 1998 after failing to terminate him in 1996. The judge accepted the Respondent's representation that the 1998 layoff was caused by adverse economic developments that required the Respondent to reduce its work force by more than 50 employees, or some 20 percent.[4] In such circumstances, it is understandable that the Respondent would seek to terminate employees whom it considered to be marginal performers. Thus, it is entirely plausible that the Respondent selected Casey for layoff for lawful reasons even though it had not discharged him before. The Respondent may reasonably have deemed Casey an acceptable employee when business was good, but not when business had turned sour and it was necessary to trim the work force while retaining its best employees.[5] Accordingly, in the absence of any other evidence that the Respondent knew of Casey's support of the Union, we do not think it proper to infer such knowledge, or an antiunion motive in his layoff. We shall therefore dismiss the 8(a)(3) allegation insofar as it pertains to Casey's layoff.

2. The Respondent contends that the judge erred in finding that it violated Section 8(a)(3) by laying off Bryan O'Connell because O'Connell was a supervisor. We find no merit in that contention.

O'Connell was a trainer. He spent approximately half of his working time training other employees to use various pieces of equipment, and the other half operating equipment or assisting his supervisor, Mark McIllivain. As the judge found, O'Connell attended management meetings and took part in employee evaluations, as part of a process in which all of the employees in a work team would evaluate each other. O'Connell also initialed other employees' timecards and signed reprimand forms when McIllivain directed him to do so. The judge found that none of those aspects of O'Connell's authority were sufficient to render him a statutory supervisor.

In its exceptions, the Respondent contends that the foregoing aspects of O'Connell's authority establish that he was a supervisor. It also argues that O'Connell possessed other types of authority, which the judge did not discuss, that also establish his supervisory status. Thus, the Respondent cites management's reliance on O'Connell's evaluations of the employees whom he was training, including in making decisions about whether or not to retain probationary employees. The Respondent also relies on the fact that when McIllivain was absent, O'Connell sometimes was in charge of his department and had the authority to send employees home if they were sick. The Respondent further notes that O'Connell critiqued other employees and that Robin Robinette, the Respondent's director of human resources, testified that he had the authority to suspend employees who were suspected of wrongdoing. Finally, the Respondent relies on such secondary indicia of supervisory status as the fact that O'Connell was higher paid than other rank-and-file employees and that he wore the same uniform as certain supervisors and parked in the parking lot reserved for managers and supervisors.

> Section 2(11) of the Act defines a supervisor as
>
> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The statutory indicia are listed in the disjunctive; thus, the possession of any one of them is sufficient to establish an individual as a supervisor.[6] The exercise of any such authority, however, must involve the use of independent judgment.[7] As the party alleging that O'Connell was a supervisor, the Respondent has the burden of persuasion on that issue.[8] We agree with the judge that the Respondent has failed to carry that burden.

In affirming the judge's finding that O'Connell was not a supervisor, we find that his evaluations of the progress made by probationary employees do not constitute supervisory authority. Such evaluations, made by a more experienced employee on the basis of his superior knowledge, do not establish supervisory status if they do not, by themselves, affect the wages or job status of the employees being evaluated.[9] The Respondent, however, cites the testimony of one of its former managers, Bill Nance, that trainers could recommend retaining or not retaining probationary employees and that he and other managers listened to the trainers' evaluations and would

[4] The decision to lay off is not alleged to be unlawful. The complaint alleges only that certain employees were included in the layoff because they supported the Union.

[5] This is not, in other words, a typical condonation case, in which an employer tolerates an employee's misconduct until union activity begins, and then discharges him, assertedly because of the previously tolerated misconduct. In such cases, the only intervening event is the union activity. Here, another intervening event occurred: the economic reverses the Respondent suffered, necessitating a reduction in its employee complement.

[6] See *Elmhurst Extended Care Facilities*, 329 NLRB 535 (1999).

[7] Id.

[8] Id.

[9] Id.

rely on their recommendations. Nance did not, however, provide specific examples detailing the circumstances surrounding management decisions regarding probationary employees and the effect, if any, of the trainers' evaluations in that decision-making process. The Respondent thus has not established that there was a direct link between the trainers' evaluations and recommendations and management decisions regarding whether to retain probationary employees.[10] Accordingly, we find that the Respondent has not demonstrated that the trainers made effective recommendations concerning the continued employment of probationary employees.

Other factors relied on by the Respondent have not been shown to entail the use of independent judgment on O'Connell's part. Thus, neither initialing timecards nor sending employees home when they are sick (a form of authority O'Connell never exercised) indicates the use of independent judgment. Neither does signing reprimand slips at McIllivain's direction.[11]

Similarly, although Robinette testified that O'Connell could suspend employees, the only specific circumstances in which she testified that he could exercise that authority were "if someone was alleged to have done something and the Company or someone was wanting to suspend that person pending an investigation." That testimony indicates that whatever authority O'Connell may have had to suspend employees existed only when "the Company or someone" desired that such action be taken. Thus, even if O'Connell possessed the authority to suspend, we find that the Respondent failed to demonstrate that the exercise of such authority involved the use of independent judgment by O'Connell.

Further, the authority possessed by O'Connell in McIllivain's absence is insufficient to confer supervisory status. O'Connell testified that he substituted for McIllivain only about four times, and he did not indicate the duration of those incidents. Such sporadic assumption of supervisory duties does not establish supervisory status at other times.[12] In addition, O'Connell testified only that McIllivain left him "in charge" on these few occasions when he was out. Based on this scant evidence, the Respondent has not met its burden of showing that O'Connell either possessed or exercised any statutory supervisory authority during those occasions when he substituted for McIllivain.[13]

The Respondent also relies on the fact that O'Connell critiqued other employees' job performance and took part in the periodic evaluations of employees. Those factors do not establish O'Connell's supervisory status, however, because there is no showing of how, if at all, O'Connell's actions affected other individuals' status as employees.[14] In particular, we note that the evaluation process was an event in which team members participated in each other's evaluations, and there is no showing that O'Connell had any greater input than any other rank-and-file employee.

Finally, the existence of secondary indicia cannot confer supervisory status, in the absence of any of the statutory indicia.[15]

For all the foregoing reasons, then, we affirm the judge's finding that O'Connell was an employee and not a supervisor, and that the Respondent violated Section 8(a)(3) by selecting him for inclusion in the October 7 layoff because of his union activities.

3. We agree with the judge, for the reasons discussed in his opinion, that discriminatee Eric Martin did not waive his right to obtain relief under the Act by signing a severance agreement in which he purported to release the Respondent from all legal claims arising from his employment with the Respondent, including those arising under the Act.[16] As the judge noted, the Board in *Hughes Christensen Co.*, 317 NLRB 633, 634 (1995), enf. denied on other grounds 101 F.3d 28 (5th Cir. 1996), held that the validity of waiver and release agreements of the sort at issue here should be evaluated in the same manner as private non-Board settlement agreements, as discussed in *Independent Stave Co.*, 287 NLRB 740

[10] Id.

[11] Indeed, Nance testified that the trainers could not take disciplinary action, but were supposed to bring personnel problems to him to resolve. He also testified that, although the trainers could sign disciplinary forms, both he and McIllivain also signed them and would do their own investigations of the situation. Moreover, the slips signed by O'Connell and introduced into evidence by the Respondent are entitled "Employee Consultation Form." All three were reports of failure to adhere to proper work standards, and all indicated only the action that the employee needed to take to perform properly. None contained any recommendation for disciplinary action; they indicated only that the employees had received verbal notices for the conduct in question. There is no mention of any effect on the employees' job status or tenure. Thus, even if O'Connell had signed the slips on his own and not at McIllivain's direction, his actions would not constitute the exercise of supervisory authority. *Passavant Health Center*, 284 NLRB 887, 889 (1987).

[12] *Latas de Alumina Reynolds*, 276 NLRB 1313 (1985).

[13] See *St. Francis Medical Center-West*, 323 NLRB 1046 (1997) (Board agrees that alleged supervisor "exercised supervisory authority" during substitutions, but finds that the substitutions were not "regular and substantial"); *Aladdin Hotel*, 270 NLRB 838, 840 (1984) (test is "whether the part-time supervisors spend a regular and substantial portion of their time *performing supervisory tasks* or whether such substitution is merely sporadic and insignificant") (emphasis added).

[14] *Passavant Health Center*, supra at 889; *Elmhurst Extended Care Facilities*, supra, at 3.

[15] *First Western Building Services*, 309 NLRB 591, 603 (1992).

[16] We do not, however, rely on the judge's discussion of the conditions under which an employee may waive a union's rights.

(1987). In *Independent Stave*, the Board listed four factors bearing on the validity of such agreements:

> (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatees have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Id. at 743. Here, as the judge found, the Charging Party Union did not agree to be bound by the terms of the Respondent's agreement with Martin, and the General Counsel argues that Martin should not be bound by the agreement. As the judge further found, the Respondent previously committed serious violations of the Act.[17] We agree with the judge that, in these circumstances, Martin should not be found to have waived his right to relief under the Act by signing the severance agreement.

Our dissenting colleague would find it immaterial that the Union did not agree to be bound by the severance agreement, because at the time Martin signed the agreement, no charges had been filed. We find no merit in that position. Even though there was no charging party to consult with concerning the agreement at the time it was signed, the agreement clearly was meant to settle any future causes of action arising from Martin's layoff, expressly including any that might arise under the Act if a charge was later filed. Had the Union filed its charge before Martin signed the agreement, we would consider whether the Union had agreed to be bound as one factor in determining whether to give effect to the agreement. In fact, Martin signed the agreement on October 7, the day he was laid off. That he did so before the Union even had a chance to become involved by filing a charge (which it did the next day) should not, in our view, make any difference. Indeed, it seems to us further reason to find that the agreement does not preclude us from affording relief to Martin.

Our colleague also argues that, even if we give effect to the settlement agreement and dismiss the allegations concerning Martin, the Respondent will still be required to post a notice assuring employees that it will respect their Section 7 rights. We reject that argument as well. Posting a notice will inform employees of their rights, but it will not give relief to Martin, whose rights the Respondent transgressed. Moreover, if we failed to find the violations with regard to Martin and order him reinstated and made whole, it might well appear to the employees that their rights are not adequately protected.[18]

ORDER

The National Labor Relations Board orders that the Respondent, Webco Industries, Sand Springs, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities;

(b) Threatening employees with unspecified reprisals for union or other protected activities;

(c) Imposing on employees an unlawful no-solicitation policy;

(d) Terminating and laying off employees because of their union activities;

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Robert Leasman, Gary Schooley, Jerry Rogers, Roy Morris, Shawn Wilson, Richard Teague, Terry Ruckman, Eric Martin, Charlie Williams, and Bryan O'Connell full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Robert Leasman, Gary Schooley, Jerry Rogers, Roy Morris, Shawn Wilson, Richard Teague, Terry Ruckman, Eric Martin, Charlie Williams, and Bryan O'Connell whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from the files of Robert Leasman, Gary Schooley, Jerry Rogers, Roy Morris, Shawn Wilson, Richard Teague, Terry Ruckman, Eric Martin, Charlie Williams, and Bryan O'Connell all reference to their termination and layoffs, and within 3 days thereafter notify them in writing that this has been done and that those actions will not be used against them in any way.

[17] We note that, since the judge issued his opinion, the Board's previous decision has been enforced. *Webco Industries*, 327 NLRB 172 (1998), enfd. 217 F.3d 1306 (10th Cir. 2000).

[18] In any event, whether a partial remedy is adequate is not one of the factors that we consider under *Independent Stave*.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Sand Springs, Oklahoma, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 24, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CHAIRMAN HURTGEN, dissenting in part.

I would uphold the agreement between Respondent and employee Martin. Accordingly, I would dismiss the charge as to him.

Respondent laid off Martin on October 7. On that date, Respondent and Martin entered into a "severance agreement." In return for consideration (including a monetary payment), Martin agreed not to file any claim with any court or agency concerning his employment with Respondent or the termination thereof. Further, if any court or agency received a case concerning such matters, Martin would seek to withdraw therefrom. Respondent advised Martin to consult with an attorney, and Respondent gave Martin time to consider the matter. Martin signed, and has never revoked.

My colleagues reject the agreement under the test of *Independent Stave*, 287 NLRB 740, 790. The four factor test is:

> (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

At the outset, I am not at all certain that *Independent Stave* applies to the agreement here. *Independent Stave* applies to an agreement reached in settlement of an NLRB case. By contrast, the instant case involves an agreement reached before there was any NLRB case. Indeed, the agreement provides that no such case will be filed.

My colleagues have missed my point in this respect. It is *not* that "there was no charging party to consult with concerning the agreement at the time it was signed." Rather, my point is that the first factor of *Independent Stave* does not fit this case. The first factor is whether the Charging Party agreed to be bound to the settlement. In the instant case, there was no charging party at the time of the settlement.

My colleagues' reliance on *Hughes Christensen*, 317 NLRB 633, 634 (1995), is a further indication that they have missed my point. In that case, there were charges at the time of the settlement. That is not the situation here.

Further, even assuming arguendo that *Independent Stave* applies, I would give effect to the agreement. Of the four factors in *Independent Stave*, my colleagues find defects only in factors 1 and 4. As to factor No. 1, there could be no Charging Party agreement because there was no Charging Party at the time of the agreement. Thus, this is not a case where a Charging Party had advised the employee not to sign the agreement, and the employee nonetheless signs it.

As to factor 4, I agree that Respondent has committed other unfair labor practices. However, even if those unfair labor practices constitute a "history" of violations, that should not necessarily void the agreement. My colleagues believe that an employer (or union) with such a history cannot validly settle a case. I disagree. I believe that NLRB policy regarding settlements must take into account two goals: (1) encouraging parties to settle dis-

[19] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

putes and enforcing those agreements; (2) assuring employees of their statutory rights. In the instant case, we can achieve both objectives. The voluntary agreement of Respondent and Martin can be upheld, and the employees will nonetheless be assured of their statutory rights. That is, even with the Martin allegations removed, the violations of the Act found here will yield a remedial notice that will assure employees of their statutory rights.

My colleagues say that a remedial notice will not give relief to Martin. However, Martin has settled his claim with Respondent, and has accepted a monetary payment as part of that settlement. My colleagues now give Martin relief in addition to his settlement. Further, the Union (and Martin) are free to publicize the relief that he received.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate employees about their union activities.

WE WILL NOT threaten employees with unspecified reprisals for engaging in union activities.

WE WILL NOT restrict employees' discussions about the Union on nonwork time in a de facto breakroom or on work time when employees are permitted to discuss other subjects.

WE WILL NOT terminate or lay off employees because of their union or other protected activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your Section 7 rights.

WE WILL, within 14 days from the date of the Board's Order, offer Robert Leasman, Gary Schooley, Jerry Rogers, Roy Morris, Shawn Wilson, Richard Teague, Terry Ruckman, Eric Martin, Charlie Williams, and Bryan O'Connell full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharges or layoffs, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharges and layoffs of the employees named above, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that those actions will not be used against them in any way.

WEBCO INDUSTRIES

Francis A. Molenda, Esq., for the General Counsel.
David E. Strecker and *James Erwin, Attys.* (*Strecker & Associates),* of Tulsa, Oklahoma, for the Respondent.
Nga Ostoja-Starzewski, Atty.(Youngdahl, Sadin, & McGowan), of Little Rock, Arkansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Tulsa, Oklahoma, on May 11–13 and June 8–9, 1999,[1] pursuant to an amended complaint issued by the Regional Director for the National Labor Relations Board for Region 17 on March 8, 1999, and which is based on charges filed by United Steel Workers of America (here called Union) on October 9, December 29 (first-amended), March 3, 1999 (second-amended), and April 30, 1999 (third-amended).[2] The complaint alleges that Webco Industries (here called Respondent) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, (the Act).

I. Whether Respondent acting through its supervisors, violated Section 8(a)(1) of the Act: (a) by interrogating employees about their union activities; (b) by prohibiting employees from discussing their terms and conditions of employment with other employees and/or restricting conversations about the Union to the breakroom; (c) by threatening employees with unspecified reprisals if they engage in union activities and by implying that union activities were under surveillance by Respondent; (d) by engaging in surveillance of employees' union activities by videotaping these activities; and (e) by threatening employees with a shutdown of Respondent's facility if employees engage in union activities.

II. Whether Respondent violated Section 8(a)(1) and (3) of the Act by permanently laying off certain of its employees because said employees joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

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[1] All dates here refer to 1998 unless otherwise indicated.

[2] On June 8, 1999, a day beginning the second week of hearing, the Union filed a fourth-amended charge (GC Exh. 1(t)).

III. Whether Respondent violated Section 8(a)(1) and (4) of the Act by permanently laying off certain of its employees because said employees testified at an unfair labor practice hearing in Cases 17–CA–19047 and 17–CA–19120.

IV. If Respondent unlawfully permanently laid off any employees who executed certain severance agreements/releases, were said documents legally sufficient to confer immunity on Respondent for its actions.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a corporation engaged in the business of manufacturing and distributing steel tubing and having an office and place of business located in Sand Springs, Oklahoma. Respondent further admits that during the past year ending February 28, 1999, in the course and conduct of its business it has purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Oklahoma. During the same year ending February 28, 1999, also in the course and conduct of its business, Respondent admits that it sold and shipped from its facility, goods valued in excess of $50,000 directly to points outside the State of Oklahoma. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. T HE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that United Steel Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. General background

On Wednesday, October 7, 53 employees were permanently laid off by Respondent. In order to receive a severance payment offered to most of the laid-off employees, employees were required to sign a "severance agreement/release" acknowledging among other conditions, that they could never work for Respondent again. Those who declined to sign the document received no severance, but are nevertheless permanently barred from re-employment by Respondent pursuant to company policy. This policy although apparently predating October 7, for several years was not generally disclosed to employees prior to any layoff in which they or their coworkers were involved.

From the group of 53 employees referred to above, the General Counsel initially carved out 14 employees, which he claims were laid off for union-related reasons. In a later amendment to the complaint, the General Counsel added three additional names to the group described above. In addition, the General Counsel alleged that 3 of the 17 were laid off for an additional or alternative reason: because they testified at an unfair labor practice hearing in September 1997.

Before hearing of this case concluded, several of the 17 alleged discriminatees reached private non-Board Settlement Agreements with Respondent. The first such group consisting of Mike Leslie, Chris White, Don Greenfield, and Eddie Davis whose names were recited before I closed the record, has now been supplemented with a second group consisting of Chris Buchanan, Andy Stephenson, and Rick Hake (GC Br., p. 11, fn. 7).[3] The terms and conditions on which non-Board Settlements have been reached are not part of this record—no party expressing any desire to incorporate them. Accordingly, I do not concern myself with any such terms and conditions except for the parties' agreement that testimony given or evidence adduced during the hearing by those who reached non-Board settlement or by any other witness is not affected by the settlements, specifically with respect to the 8(a)(1) allegation, or as regarding the remaining alleged discriminatees.

As to those who remain as alleged discriminatees, they are divided into those who signed the severance/releases and those who did not. As to the former, an issue is presented and will be considered in due course regarding the effects, if any, of the severance/releases.[4]

Other divisions of employees may be relevant to this case. For example, I may compare the 17 alleged union supporters to the remaining laid-off employees, a group which included supervisors, clericals, trainers, and production and maintenance employees. According to Respondent's evidence, a full-scale restructuring of its operations at one of its facility coincided with the October 7 layoff. All of those laid off—alleged union supporter or not, may need to be compared to the 80 percent of Respondent's workforce not laid off. This group allegedly includes some union supporters, according to Respondent, a claim, which will be subject to close scrutiny below.

As still more general background, I note that on May 20, 1999, a U.S. District Judge in Tulsa, Oklahoma, granted the General Counsel's petition for relief pursuant to 10(j) of the Act (GC Exh. 12(o)). Pursuant to this Order, Respondent was directed to reinstate within 5 days of the court's order, alleged discriminatees Gary Schooley, Roy Morris, Jerry Rogers, Bob Leasman, Shawn Wilson, and Terry Ruckman. As to Morris and Rogers, the court provided that on a showing of insufficient

[3] At the hearing, the General Counsel made a formal motion to delete the names of the first four from the complaint, a motion which I granted. I will construe General Counsel's motion at hearing as covering the additional three alleged discriminatees and strike their names from the complaint.

[4] As to those who signed the severance/releases, accepted the severance payment, and remain in the present case, I am informed that Respondent is now suing them in state court for return of the money, on the grounds that their presence in the present case constitutes a breach of the severance/releases, one condition of which is that the employee gives up any and all rights he may have to file charges with a governmental agency, such as the NLRB, with respect to his loss of employment or to even participate in such a case seeking relief. The Union has complained to the Board's Regional Office that these suits are themselves a violation of the Act and the Regional Office is investigating.

work for both, then one or the other shall be placed on a preferential hiring list (p. 3 of Order). As to other relief, the court enjoined Respondent from enforcing certain of its work rules, threatening its employees with unspecified reprisals and/or implying that union activities are under surveillance. These provisions generally track allegations from the complaint. The court's order is to remain in effect pending final disposition of matters pending before the Board.

So far as I am aware, Respondent has fully complied with the court's order and it informs me, it is pursuing an appeal before the U.S. Court of Appeals for the Tenth Circuit.[5]

2. Prior unfair labor practice case

In early 1997, the Union began a campaign to organize certain of Respondent's production and maintenance employees. Respondent opposed this campaign, in part by committing certain unfair labor practices. Charges were filed and a hearing held in September 1997. On May 4, Judge Anderson issued a decision finding certain violations and on November 30, the Board affirmed the judge in certain respects (*Webco Industries,* 327 NLRB 172). Respondent informs that it is now appealing the Board's decision to the U.S. Court of Appeals for the Tenth Circuit. As of this writing, I have not been informed of any result. [Enfd. 217 F.3d 1306 (10th Cir. 2000).]

Many of the participants in the instant case, such as attorneys and witnesses were "old friends" from the first case. Even some of the issues were similar. For the record, however, I base my decision here on the evidence produced in this hearing, except to the extent, the prior case and other evidence might establish animus toward the Union.

A minor distraction is presented by the conflict in the evidence over whether the 1997 organizing campaign had been preceded by one or more prior campaigns. Two General Counsel witnesses, former Respondent executive Harvey Whittenburg, a 23-year employee, and alleged discriminatee Charley Casey, a 26-year employee before his layoff, both recalled prior union campaigns. The former recalled campaigns by the Charging Party in the mid-1980's and early 1990's. Casey corroborated this testimony without any details. Respondent's witnesses flatly denied any such prior organizing activity. Respondent's president and chief operating officer, Dana Weber, a Respondent executive for 22 years, and Respondent's vice-president of operations, Tom Lewis, a Respondent official for 17 years, both denied prior organizing activity. I note this issue has only minimal importance as to the credibility of Whittenburg, but I credit Respondent's two witnesses on the point. The General Counsel called two union organizers, Murlin Andrews, with the Union since 1976 and Jim Teague, a union organizer for 5 years. Neither of them testified about a prior union organizing campaign nor were any union records presented to bolster the testimony of Whittenburg.

[5] Neither the granting nor the denial of 10(j) relief is binding on the Board or determinative of the merits of a subsequent unfair labor practice proceeding. *Sullivan Bros. Printers,* 317 NLRB 561, 566 fn. 14 (1995); *NLRB v. Q-1 Motor Express,* 25 F.3d 473, 477 fn. 3 (7th Cir. 1994).

3. Union's 1997 organizing campaign

No dispute is presented about the existence of or the results of the 1997 union campaign. The in-house organizers distributed union authorization cards to be signed and all save one of the alleged discriminatees signed one. Meetings were held and flyers were distributed. Discussions about the benefits and burdens of bringing a union into Respondent were held at work. Within just a few months of the campaign, it became clear to the Union's leadership, that they lacked a level of support high enough to continue the campaign. Accordingly, without filing a petition for election or making a demand for recognition by Respondent, the Union withdrew from the field with a promise to fight again another day. All of this and more was contained in a union letter to Respondent's employees, dated April 7, 1997, explaining the Union's reasons for the suspension of its campaign (R. Exh. 71). I see no point in reciting the Union's letter except to note it blamed the Union's lack of success on Respondent's unfair labor practices.

4. Respondent's business and facilities

As I will describe below, Respondent has many facilities, both located in Oklahoma and elsewhere, but appropriately enough, the focus of this case is on the Southwest Tube (SW Tube) facility located in Sand Springs, Oklahoma, about six miles from Tulsa. When the company began operations in 1969 founded by Frank Weber, a/k/a Bill Weber, it began as SW Tube. As I understand it, over the years other facilities were established, but SW Tube remains the largest production facility. Bill Weber testified as Respondent's witness and described his efforts building the company between 1969 and the present. Currently Respondent's Chairman of the Board and Chief Executive Officer, Bill Weber's proudest achievement perhaps is bringing into the business, his daughter, Dana Weber. Regrettably, Bill Weber's impressive record is stained by the allegations involving his role in the Union's campaign, a subject to be dealt with below.

Relying primarily on Dana Weber's testimony, I will review the extent of Respondent's business. Respondent is described as primarily a manufacturer and distributor of specialty steel tubing, with some additional business involving the manufacture of high efficiency industrial water heaters. It employs slightly over 700 employees in all facilities. Respondent has two manufacturing facilities located in Sand Springs, SW Tube and Specialty Steel Components & Manufacturing (SSCM) located about ½ mile apart. In Manford, Oklahoma, 15 to 20 miles distant from Sand Springs, Respondent's facility manufactures stainless tubular products, and in Oil City, Pennsylvania, Respondent manufactures carbon tubing—a similar operation is at SW Tube, where Respondent manufactures carbon tubing for heat exchanger, boiler, and mechanical parts. In addition to the manufacturing facilities, Respondent operates six distribution facilities located in Grand Rapids, Michigan, Rock River, Illinois, Nederland, Texas, Tulsa and Sand Springs, Oklahoma.

The focus is on SW Tube because the Union's organizing campaign occurred there, the Respondent's business shortfall, the layoffs, restructuring, and alleged unfair labor practices all occurred there. Before the layoffs, SW Tube employed about

273 employees and after layoffs about 220. That figure was further reduced to 210 by the time of hearing. Beginning in the spring of 1999, Respondent began to hire new employees for its Tulsa area facilities and some of them were assigned to SW Tube. Some of these new employees were part of a special campaign designed to recruit Spanish-speaking employees, teach them to speak and understand English, and employ them where needed.

As already mentioned, none of those laid off were eligible for rehire. Respondent did not contest awards of state unemployment compensation, although the employees were in effect terminated allegedly for being marginal and/or unsatisfactory employees.

Respondent's policy is to disfavor transfers on the grounds that employees at SW Tube operate machines and perform other work, which is not suitable for transfer to other facilities. Since Respondent's restructuring involves cross-training of employees to operate more than one machine, it is not at all clear to me why at least some laid-off employees could not have been transferred to other nearly facilities. Respondent's evidence that the tube cutting machines at SSCM are too dissimilar from the machines at SW Tube is not persuasive.

SW Tube contains three operating areas cold draw, weld mill and finishing, and additional support areas such as maintenance, human relations, purchasing, quality assurances, and tool and dye.

A curious aspect of this case concerns the undisputed business shortfall, which affected only SW Tube. Respondent's other facilities including SSCM located across the street were unaffected and experienced no layoffs. Moreover, all facilities including SW Tube after passage of a few months, replaced employees who left in the course of normal employee turnover. Both before and after the layoffs in this case, SW Tube operated its production facilities 7 days/week, 24 hours/day.

5. Respondent's prior layoffs

If there was disagreement over whether the Union had tired to organize Respondent prior to 1997, all agree that Respondent experienced prior lay-offs before October 7. According to Robin Robinette, Respondent and General Counsel witness and Respondent director of human resources, there were layoffs at SW Tube Co. in 1995 (approximately 22) and in 1990 (approximately 70). From these two prior layoffs, I find two facts: first, is explained by the General Counsel's witness, Larry O'Brien, a former quality assurance manager for Respondent between 1993 and October (when he himself was laid off). In 1995, O'Brien was involved with making decisions as to who was to be let go. The persons released were employees who had poor evaluations and poor attendance records (Tr. p. 193). Second, as explained by Robinette, the two prior layoffs released people who were never eligible for reemployment with Respondent per company policy. This odd company practice continued during the layoffs of October.

B. Analysis and Conclusions

1. Alleged videotaping of union handbilling

According to former alleged discriminatee and the General Counsel witness Chris Buchanan, on August 19, he was engaging in his usual practice of temporarily substituting for a guard at Respondent's guard shack while the guard took a break. At this time, he was allegedly directed by Robinette to videotape some handbilling that was occurring about 5 to 6 p.m. as Respondent's employees changed shifts. For a number of reasons, I don't believe Buchanan's testimony and I will recommend that the allegation be dismissed.

Buchanan worked for Respondent between April 1995, and October 7, as a storeroom attendant and parts crib employee. During his time there, Buchanan was suspected by Respondent's managers of stealing from the parts crib, but they were not able to gather sufficient evidence or any credible evidence so far as I can tell, to substantiate their suspicions. In any event, it seems most unlikely that Robinette would have assigned a delicate task of videotaping employees to such an employee. In fact, she denied doing so, although the evidence shows that a number of fixed security cameras were in place at various locations around the plant and the monitor in the guard shack was capable of videotaping. However, Respondent presented Buchanan's timecards for the time he claimed to have been working and these timecards contradict his testimony, showing that he was not employed on the day in question (R. Exhs. 171, 172).

To be sure, the Board has held that absent proper justification, an employer photographing or videotaping employees engaging in protected activities is unlawful, because it has a tendency to intimidate. *Randell Warehouse of Arizona, Inc.*, 328 NLRB 1034, 1036–1037 (1999) citing *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). While the union handbilling which occurred on the day in question is protected concerted activities, I simply don't believe the General Counsel's evidence.

Out of an abundance of caution, Respondent notes the evidence presented in this case regarding the August 19 surveillance of the handbilling by Respondent's supervisors (Br. pgs. 54–55). First, no issue is raised by the complaint or by any General Counsel contention that I should make a finding on this issue.[6] The purpose of this surveillance evidence appears to be solely as it relates to alleged discriminatee Robert Leasman, whose case I will consider below. Nevertheless, I will note the evidence as follows. On August 19, it is undisputed that a Respondent supervisor and witness named Teddy Gene Dye, Jr. began his 12-hour shift at 6 a.m. Sometime in late afternoon of that day, he received information that union agents were handbilling the incoming and outgoing employees. So on a hot August afternoon, Dye went to a location in plain view of all employees (Dye wanted to be seen, Tr. p. 1131), and watched the handbilling for about an hour. Dye's explanation for this surveillance, that he wished by his presence to prevent any incidents by anti-union employees from occurring is demonstrably false. Dye testified that in a 1997 handbilling, some employees crushed the handbill up and threw it back in the face

[6] The general rule is that no unlawful visual surveillance can be found where employees carry on their protected activities openly. See e.g., *Roadway Package Systems,* 302 NLRB 961 (1991) (open handbilling outside plant entrance); *Harry M. Stevens Inc.,* 277 NLRB 276, 276-277 (1985) (open distribution of union literature in sales area).

of the union agent. Other employees signaled their disapproval by peeling away on the gravel driveway. However, at one point, on August 19, Dye sat on the tailgate of his truck for a period of time as he conferred with Ronnie Ryker, the incoming supervisor and Respondent witness, who needed to be briefed by Dye on what had happened on Dye's shift. Clearly, Dye's alleged interest in preventing a disturbance was not served as he conferred with Ryker for several minutes, while facing away from the handbilling.

Any doubt that Dye's explanation for his surveillance is not to be believed is provided by this final selection from his testimony. At one point, two employees, apparently not sympathetic to the Union's message, left the plant in their vehicle and circled the block. With Dye watching from his bright red pickup truck, one of the two employees "mooned" the union agent while yelling out the window. Dye knew who the employees were, employees not deterred from misconduct by Dye's presence on the scene, and the next day, according to Dye, "we did talk about it a little bit, that they needed to be a little more professional, be more mature, basically: [Tr. 1130–1131]. Not only were the employees not written up, but Dye didn't even document the candy-coated "rebuke."

2. Alleged threat of Supervisor Ronnie Cole

According to Buchanan, on August 22, Respondent's Shift Business Manager Ronnie Cole held a meeting with Buchanan and other employees to talk about the company's policy regarding the union. To emphasize his point, Cole had a union contract from another company. Supposedly, Cole then said that [Bill] Weber had said he'd shut the plant down and move to Mexico before he'd let the Union in. Cole then added that the company was keeping some sort of list [of union supporters]. To rebut this testimony, Respondent called its supervisor Ronnie Cole who denied Buchanan's testimony.

No other employees were called to corroborate Buchanan on this point and it is not helpful to the General Counsel's case that I may find below that Bill Weber did make statements such as that which Cole is accused of repeating. The issue here is the credibility of Buchanan, which is not great. In recommending dismissal of this allegation, I note first his lack of credibility in the prior allegation. Then I note that in his direct testimony, Buchanan claimed to be a union supporter though he could point to no specific union activities, such as attending union meetings or signing union cards. Even his testimony regarding discussions about the union was vague.[7]

3. Alleged restraint on employees' right to discuss terms and conditions of employment amongst themselves

This allegation involves two employees, former alleged discriminatee Andrew Stephenson and Micah Wise and Respondent's supervisor Monty Pratt. All three testified. Prior to his layoff in October, Stephenson had worked for Respondent since August 1992, in the cold-draw tooling in the tool and dye department. In September, according to Stephenson, he and a co-employee Micah Wise, who testified as a Respondent witness asked about a pay increase, which was then allegedly due but had not been received. Pratt agreed that the two deserved it and he was going to give it, but then according to Stephenson, added, don't tell Schooley because we'll have union problems again (Gary Schooley is an alleged discriminatee who was generally regarded as the leader and most active of the in-house organizing committee. I will consider his case below).

Wise a 15-year employee who wasn't laid off, was called as Respondent's witness and told a different story from Stephenson. He recalled talking to Pratt about another employee named Wesley, who was supposedly similarly situated to Wise and Stephenson, yet was making more money. Pratt determined first that Wesley had taken some additional classes, but later determined he wasn't making more money than Wise and Stephenson to begin with. Wise didn't recall Pratt telling him and Stephenson not to talk to other employees about this.

On cross-examination Wise was asked:

> Q. And do you recall everything that was said in that conversation [with Pratt]?
> A. Not everything. I remember some things that were said. [Tr. 974.]

Then on re-direct examination, the following occurred:

> Q. Do you think if Mr. Pratt would have told you at that meeting that you were to keep your mouth shut and not talk to other employees about this, that you would remember that statement, even though it was back in September?
> A. Possibly, yes. You know, it's been awhile, so I don't recall everything that was said. [Tr. 975.]

Respondent also called Pratt, a 14-year employee who is manager of the machine shop and tooling which includes the tool and dye department. Unlike Wise, Pratt had no difficulty recalling the conversation and flatly denied ever telling Stephenson not to discuss pay issues with anyone else. However, Pratt tells a different story from both Stephenson and Wise. Pratt admitted that he had brought up Schooley's name at the end of the conversation. More specifically, "At the end of the meeting, when I had proved that in fact Kenneth Wesley wasn't getting any higher pay than they were, I told them if they had said anything out in the shop to anybody that said I was unfair, they owed that to me, to go back in the shop and tell everybody that [the matter had been cleared up].

> And I went on to say . . . "If you told Gary [Schooley] go straighten it up." And they said they would. [Tr. 1002.]

Pratt thought Stephenson had complained to Schooley because earlier in the day he had seen the two men talking and when Pratt went up to them, they stopped their conversation.

Pratt impressed me as someone who had been falsely accused of not maintaining wage parity among his employees. His feelings had been hurt and the earnest testimony he gave that the two employees should go and make things right persuades me to credit him over Stephenson. Wise tends to cor-

[7] I recognize that threats of plant closure or futility of seeking union representation are violative of Sec. 8(a)(1) of the Act. *Almet, Inc.*, 305 NLRB 626, 626–627 (1991). However, this is not a proper case to apply this authority.

roborate Pratt more than Stephenson. I will recommend that this allegation be dismissed.[8]

4. Alleged interrogation of Schooley by a respondent supervisor

It is undisputed that on September 7, Respondent supervisor Jene Harmon who did not testify called Schooley at home. During the course of the conversation, Harmon asked Schooley how the union activities were going. Schooley falsely answered that he was laying low and trying to stay out of it (In fact, Schooley was still trying to solicit people to sign union cards and attend meetings). Harmon then replied, that he understood, and added, "I just want you to know what has happened in the past, don't worry about it, we are going to try to move on with this thing and get the past behind us and make this a stronger company." (Tr. 361).

In its brief (Br. 47), Respondent first argues that it is unlikely that the conversation ever took place because Respondent's supervisors are instructed not to interrogate employees. This is a weak argument and I reject it because there is no showing that Harmon heeded these alleged instructions (Harmon never testified). Similarly without merit is Respondent's claim that because Schooley was an open and active union supporter—a position I agree with—and because other subjects were discussed in the telephone conversation for a longer period, Schooley was not coerced. Again, I must reject Respondent's bottom line. In *Randell Warehouse of Arizona, Inc.*, supra, 328 NLRB No. 153 at p. 14 (Member Brame concurring), the Board stated the probing of views relating to the Union, even addressed to employees who have openly declared their pro-union sympathies, reasonably tends to interfere with the free exercise of employee rights under the Act and, consequently is coercive. I so find here and note three additional factors in support of my conclusion. First, Schooley gave a false response to the supervisor's inquiry and this tends to support a finding of coercive question. Next, Respondent ignores the unfair labor practices, which it committed in 1997, a fact which tends to taint an inquiry which might be innocuous in other circumstances. Finally, by September 7, Respondent was gearing up to commit additional unfair labor practices, as will be more clearly recited below.[9] For now I find Respondent violated Section 8(a)(1) of the Act as alleged. See *Lucky Stores, Inc. d/b/a Gemco*, 279 NLRB 1138 (1986), pgs. 1143–1145 of JD and the Board's leading case of *Rossmore House*, 269 NLRB 1176, 1176–1177 (1984), aff'd sub. Nom. *Hotel Employees Union L. 11 v. NLRB*, 760 F.2d 1006 (1985).

5. Alleged threats by Supervisor Mark McIllivain to Bryan O'Connell

Respondent's employee Mark McIllivain was an admitted statutory supervisor until he was laid-off on October 7. He did not testify in this case so the testimony of alleged discriminatee and the General Counsel witness Bryan O'Connell remains in the record unrefuted. Briefly, O'Connell testified that he was supervised by McIllivain, a shift business manager, who approached O'Connell at work on the Friday of Labor Day week. McIllivain was returning from a routine morning meeting with his boss, Larry O'Brien when he asked O'Connell if he was talking union again. In fact, O'Connell had been talking union with alleged discriminatee Jerry Rogers. O'Connell denied the accusation, but McIllivain told him that O'Brien had instructed McIllivain to "keep an eye on" O'Connell.

Although O'Brien, a witness called by the General Counsel, was not asked and did not testify about any alleged conversation with McIllivain, I nevertheless credit O'Connell's undisputed testimony. Respondent makes two points in its brief: (p. 57) first, it urges me not to draw an adverse inference from McIllivain's absence, because McIllivain is no longer employed by Respondent. I agree. Second, Respondent, also contends that no violation can be established because O'Connell was a supervisor at the time of his encounter with McIllivain. I disagree.

In *Mississippi Power & Light Co.*, 328 NLRB 965, 969 (1999), the Board stated a good review of general principles of law which govern this issue:

> Section 2(3) of the Act excludes "any individual employed as a supervisor from the definition of "employee." Section 2(11) of the Act defines "supervisor" as:
>
> > any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and "the possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 US 899 (1949). The Board is cautious in finding supervisory status because supervisors are excluded form the protections of Section 7 of the Act: "[T]he Board has a duty . . . . not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the act is intended to protect." *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), enfg. 171 NLRB 1239 (1968), cert. denied 400 US 831 (1970). The burden of proving supervisory status is on the party alleging that such status exists. *Northcrest Nursing Home*, 313 NLRB 491, 496 fn. 28 (1993), and cases cited therein.

All agree that O'Connell had been employed as one of 12 trainers between March 1994 and October 7. Notwithstanding his title, O'Connell spend only about 50 percent of his time training new employees on how to operate six machines. The other 50 percent was spent on the floor running various machines for production purposes or running errands for McIl-

[8] Of course, Pratt's testimony that he never knew at the time that Schooley was involved with the Union is absurd and I don't credit it for a moment. Yet this false testimony is not enough to carry the day for General Counsel.

[9] I find that the so-called *Bourne* factors (*Bourne Co. v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) as recited by Member Brame at p. 1047 of *Randell Warehouse of Arizona,* are fully satisfied to find the requisite coercion.

livain. As a trainer, O'Connell attended two management meetings and participated in employee evaluations. The evaluations were done as part of a team concept where employees were taught ultimately to perform their own evaluations. When McIllivain wasn't present, O'Connell performed his duties such as the initialing of timecards or signing reprimands when directed to do so by McIllivain. O'Connell was paid $10.30 per hour before his layoff, about 25 cents per hour more than the most experienced employee in the department. According to the General Counsel witness Bill Nance, former general business manager of the cold draw department, a trainer was equivalent to a leadperson.

In its case, Respondent introduced a six-page position description for a trainer (R. Exh. 178). The document is undated but Robinette testified she prepared it in 1995. The document was never shown to O'Connell for his examination as a witness in this case and there is no credible evidence that this document determined the day-to-day activities of trainers. I note that Respondent did not call as witness any of the other trainers, all of whom (except for union supporter O'Connell) were reclassified and transferred to other jobs in lieu of lay-off as part of Respondent's restructuring.

In *McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932, 936–97 (9th Cir. 1981), the issue was whether pilot instructors were statutory supervisors. In affirming the Board's holding that the pilots were employees, the court noted that an instructor-trainee relationship is different from a supervisor-employee relationship (citations omitted). The court went on to find that any supervisory authority exercised was too sporadic to permit a finding that the pilot was a statutory supervisor. This is particularly true, the court held, where the occasional directions is exercised over fellow employees of equal rank. This precedent is directly applicable to the issue pending. I find that Respondent has failed to prove that O'Connell was ever a statutory supervisor. See *General Security Services Corp.*, 326 NLRB 312 (1998) and *SDI Operating Partners, L.P.*, 321 NLRB 111 (1996) (Neither the fact that employee attended one or more supervisor's meetings nor the fact that he was consulted regarding staffing makes employee supervisor).

Having credit O'Connell's testimony and having found him not to be a statutory supervisor, I now find that General Counsel has established a violation of Section 8(a)(1) of the Act. In the context of this case, McIllivain's comment that he had been instructed to keep an eye on O'Connell reasonably means that McIllivain was to engage in surveillance to discourage O'Connell from engaging in union activities. *Stoughton Trailers, Inc.*, 234 NLRB 1203, 1207 (1978); *NLRB v. Thermon Heat Tracing Services*, 143 F.3d 181, 187 (5th Cir. 1998) (Foreman warned each other to keep track of "union people").

6. Alleged unlawful no-solicitation rule

a.

In September, Respondent's employee and witness, J.D. Casey, held a meeting with his supervisor, Randy Watson. Then employed as a shift manager, J.D. Casey (a distant relative of alleged discriminatee Charley Casey) told Watson that he had heard some "scuttlebutt that the union was organizing" (Tr. p. 1029).[10] In response to this information, Watson "suggested" to Casey and to another supervisor who was also present, Kenneth Deeds, that the two supervisors hold a meeting with their subordinates to make sure the employees understood Respondent's no-solicitation policy and to asked if there was any questions about it. Deeds, a 23-year employee of Respondent's who also testified as Respondent's witness and Casey did as instructed and in mid-September assembled a group of about seven employees for a meeting. Both J.D. Casey and Deeds testified that Deeds read Respondent's policy to the employees from a sheet of paper. This policy is in the record and reads as follows:

NON-SOLICITATION AND DISTRIBUTION OF LITERATURE POLICY

PURPOSE: Webco intends to provide a work environment, which permits all employees to achieve the fullest possible level of productivity, with minimal interruption. In order to maintain a proper business environment free from interference and inconvenience by other employees, the company will adhere to the following solicitation and distribution of literature policy.

PROCEDURE:

1. Solicitation, distribution of literature of other nonwork related items of any kind by employees during working time of the employee doing the soliciting or distribution, or distribution of literature of any kind or solicitation during the working time of the employee being solicited or receiving the literature is prohibited.

2. Additionally, distribution of literature or other nonwork related items of any kind by employees is prohibited at all times in working areas.

3. Solicitation, distribution of literature or other nonwork related items of any kind by persons not employed by Webco is prohibited at all times on company property.

4. Webco reserves the right to regulate all posting on all bulletin boards.

5. All posting must be approved by the Director of Personnel Services and related only to Webco's business.

6. Employees who are not on duty are prohibited from entering or remaining on the premises other than for purposes directly related to Webco's business.

7. Employees who violate this policy shall be subject to discipline up to and including discharge.

[10] The date and substance of this conversation is important because it presents the second prong of a finding I will make below that Respondent was aware of renewed union activity prior to the October 7 layoff. Casey also testified at hearing, although it was not clear if he related this to Watson, that a couple of [unnamed] employees had allegedly complained to him and Deeds that they objected to people talking to them about the union and they asked Casey and Deeds for help (Tr. p. 1030). The first prong of Respondent's knowledge will relate to Union handbilling at Respondent's premises on August 19.

> 8. As used in this policy, the phrase "working time" does not include time during the workday such as rest or lunch periods when employees are not *properly* engaged in performing their work tasks. [R. Exh. 166.]

Then at the conclusion, when the two supervisors asked if anyone had questions, only one employee had a question: Why was the meeting being held? Supposedly this reading and the single question took about 30 minutes.

One of the employees attending the meeting was Eric Martin, a witness for the General Counsel and alleged discriminatee. Martin worked as a cutoff operator between December 1994, and October 7. Martin testified that Deeds stated there can be no talk regarding the Union in the shop nor can anyone pass out Union literature in the shop. Allegedly, Deeds continued to say, these things can be done in the breakroom (lunchroom) only, Martin began to shake his head, a gesture which caused Deeds to tell him not to do that. On cross-examination, Martin admitted that Deeds appeared to be reading from a piece of paper.

Out of seven employees present only Martin testified in support of the General Counsel's theory. However, another employee named David Tidwell, a 15-year employee, who currently works as a cut-off machine operator testified for Respondent. On direct examination, Tidwell generally corroborated Casey and Deeds. On cross-examination, he admitted he was vague about the meeting, except for the beginning. There he recalled Deeds saying, "I am going to read this, so that there is no misunderstandings" (Tr. p. 1009).

Based on the above summary of the evidence, I credit Respondent's witnesses. The General Counsel does not argue that Respondent's printed policy, recited above, is unlawful and I cannot find that the issue was litigated at the hearing. Accordingly, based on Deeds' reading of R. Exh. 166, I will recommend this allegation be dismissed.

b.

A second issue regarding Respondent's no-solicitation policy is presented with different witnesses. Again in mid-September, Respondent supervisor and witness Charles Conn, a quality control manager employed for 13½ years, held a meeting of two of the three employees subordinate to him. They were Jerry Rogers, an employee between August 1984, and October 7, and Roy Morris, an employee between March 1994, and October 7. A third employee named Jarred Johnson worked a different shift and did not attend. All three employees were employed as quality assurance auditors and Rogers and Morris are alleged discriminatees and the General Counsel witnesses. The two supported the union and were laid off; Johnson did not testify and was not laid off, although his job was restructured.

The meeting in question was held in the tensile room, a work area where certain testing is done, such as tensile strength of material, other testing, a computer is used and some paperwork is completed. According to Conn, he held a meeting because his then boss, O'Brien asked him to review Respondent's solicitation policy. The tensile room served many purposes: besides a work area, and room for meetings, it was also used as a lunchroom and breakroom. Rogers and Morris preferred the tensile room over the more crowded and apparently louder lunchroom. Conn himself occasionally ate his lunch in there and was aware of the more frequent usage by Rogers and Morris. I find that the tensile room was a de facto break and lunchroom for all times material.

As Conn entered the tensile room to convene the meeting, he locked the door. His explanation for doing so—to prevent interruptions—is credited only in part. Conn also wished to convey the gravity of the meeting and he succeeded in that objective. According to Rogers, Conn interrogated him about union activities, asking him if he was still serious about bringing the union into Webco. Rogers answered that he was. Conn also said that employees could talk about the union on breaktime only and in the breakroom only. Conn insisted that the tensile room was not a breakroom. Morris, essentially corroborated Rogers' testimony except he recalls adding that the Webers were the Union's best friend. On cross-examination, Morris recalled Conn saying that while it was permissible to take breaks in the tensile room, employees couldn't talk about the union there. However, other non-work subjects such as family, hunting and fishing were permissible.

In his testimony as Respondent witness, Conn stated he held the meeting in question to "communicate various things, coming down from customer relations to such as policies. And it was just updating each individual as a group, on things that are going on, as far as changes to procedures" (Tr. p. 1033). Conn denied making the statements attributed to him, but allowed on cross-examination that he didn't recall everything that he said in the meeting.

This time I credit the General Counsel's witnesses and find that Conn violated the Act by attempting to ban union talk or activities from a de facto breakroom, a non-working area when used for that purpose.[11] *Valmont Industries,* 328 NLRB 309, 318 (1999). Conn also violated the Act by attempting to restrict conversations about the Union while allowing conversations about other subjects. This rule applies both to worktime or non-worktime. *Williamette Industries*, 306 NLRB 1010 fn. 2, 1017 (1992); *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986). I also find that Respondent violated Section 8(a)(1) of the Act by Conn interrogating Rogers about his union activities.

7. Alleged threat and impression of surveillance by Supervisor Blevins to Schooley

The General Counsel's witness Schooley and supervisor Dewayne Blevins went to high school together and their sons participated in the same sports activities. Blevins has worked for Respondent for 15 years and as of September 22, he was a supervisor, but did not supervise Schooley. Both sides agree that on September 22 about 2 p.m., Schooley initiated a contact with Blevins, who Schooley described as a "friend," because Schooley had heard that an antiunion meeting had been held that day and Schooley asked his friend Blevins, if any names had been mentioned and if it was an antiunion meeting. This conversation occurred near the vending machine where Schooley had gone to look for Blevins apparently on worktime.

[11] In *Webco Industries,* 327 NLRB 172, 183–184 (1998) made a similar finding. I need not determine whether the principle of res judicata applies here.

According to Schooley, Belvins confirmed that an antiunion meeting had been held that morning, but that no names had been mentioned; Blevins added, "they don't forget, they remember from the past what is going on . . . you need to watch out what you are doing . . . . Right now, you are out of your work area so they can fire you, you need to be careful who you are talking to and where you are at . . . . they are going to make an example out of somebody" (Tr. p. 363).

According to Blevins, Schooley asked him if an antiunion meeting had been held and if any names had been mentioned. This interrogation of Blevins by Schooley, lasted a few minutes with Blevins telling Schooley only that no names had been mentioned at the meeting. Blevins concluded the meeting by saying that "this is worktime, and worktime is worktime. And you probably should be back in your area" (Tr. p. 1055).

Like the General Counsel (Br. p. 19), I find some of Blevins' testimony incredible. For example, he testified that Schooley tried to "clear" himself of union involvement, denying he was a union supporter. Blevins denied knowing that Schooley was a union supporter or even that he had testified in the prior Board hearing. On the other hand, the substance of Schooley's testimony does not differ from Blevins' in certain respects. So the question is whether a conversation initiated by an open and active union adherent with a supervisor thought to be a friend is a violation of Section 8(a)(1) of the Act. I think not in this instance for I can find no coercion. Compare *Sundance Construction Management,* 325 NLRB 1013 (1998).

To be sure, the mere existence of friendly relations between a supervisor and an employees does not preclude a finding that the supervisor employed coercion violative of the Act. *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 550 (6th Cir. 1984). Here however Blevins seems to be telling Schooley only that the Respondent would be glad to be presented with an opportunity to discharge Schooley. *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966).

As to the alleged impression of surveillance, the General Counsel must prove that Schooley would reasonably assume from the statement in question that his union activities had been placed under surveillance. *United Charter Service*, 306 NLRB 150 (1992). Even assuming for the sake of argument that I credit Schooley's testimony in toto, I cannot find that it was his union activities under surveillance, but his activities outside of his work area during working time that would be placed under surveillance. In recommending that this allegation be dismissed, I note that Blevins could have disciplined Schooley for being out of his work area at the time of the conversation. Instead, Blevins merely told Schooley to return to his work area and be careful in the future. To find a violation here would not only be outside Board law, but would turn the principles of equity upside down and inside out.

8. Alleged unlawful layoffs of certain employees

The General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that union or other activity which is protected by the Act was a motivating factor in Respondent's'' action alleged to constitute discrimination in violation of Section 8(a)(3). Once this is established, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent goes forward with such evidence, the General Counsel "is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee['s] protected activities." *Wright Line*, 251 NLRB 1983 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 US 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 US 393 (1983). See also, *Fluor Daniels, Inc.*, 304 NLRB 970 (1991) and *Manno Electric,* 321 NLRB 278, 280, fn. 12 (1996). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302, fn. 1 (1984). "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge, animus, and adverse action taken against involved or suspected of involvement, which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing, false reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences. *Adco Electric*, 307 NLRB 1113, 1128 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991).

In this case, I find that the General Counsel has established a strong prima facie case of discrimination against the remaining alleged discriminatees because of their union or other protected activities.

a.

As will be mentioned below, I find first that the General Counsel has established renewed union activity. As first mentioned in fn. 10 above, the Union resumed its union activity beginning with the distribution of union flyers on August 19.[12] Respondent was well aware of this activity and other activity within the plant. Witness the testimony of supervisor Dye who watched this activity for 1–2 hours on a hot afternoon. Animus is amply demonstrated not only by the unfair labor practices committed in the prior *Webco* case, 327 NLRB 172 (1998), but by the 8(a)(1) violations found in this case, although fewer than those alleged. Any remaining doubt of animus will evaporate as I recite below the testimony of certain General Counsel witnesses not yet mentioned. The adverse action, of course, is evident.

I begin by noting the timing factor, which to me is "stunningly obvious." *NLRB v. Long Island Limousine Service Corp.*, 468 F.2d 292, 295 (2d Cir. 1972); see also *NLRB v. Rain*

[12] The argument at hearing whether the Union was beginning a new campaign or merely resuming its 1997 campaign is an argument I do not join as it makes no difference to any issue in this case.

Ware, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984). In sum, shortly after Respondent became aware of the resumption of union activity, layoffs began. This is not the only factor, but it is one factor. (Compare *Frierson Building Supply Co.*, 328 NLRB 1023, 1024 (1999). To be sure this factor has less prominence in the present case compared to other cases because of the undisputed economic shortfall, which Respondent experienced at its SW Tube facility.

I also note that Respondent attempted to justify its lay-offs by referring over and over to an employee's "bad attitude." The Board has long held that such terminology is a code word for supporter of union activities. See e.g., *Denholme & Mohr, Inc.*, 292 NLRB 61, 67 (1988).[13] "Bad attitude" in Respondent's lexicon includes resistance to being a "team player," unwillingness to change jobs or shifts in accord with Respondent's needs (inflexibility), failure to undergo additional training and attendance problems. Robinette testified she relied in part on her subjective impressions of employees from her several years as plant manager to justify the layoffs.[14] In some cases, Respondent presented certain evaluations to corroborate Robinette's impressions, in other cases, the General Counsel offered evaluations to rebut. Besides "bad attitude" meaning "union supporter," there is another problem: when the alleged discriminatees asked on October 7 why they were being laid off, not one was told because of bad attitude or for any other personal or disciplinary reason. Even where certain employees specifically asked if certain prior disciplinary actions or screw-ups were the reason for the layoffs, they were all told the layoffs were due to an economic shortfall or competitive pressures. This vacillation in offering a consistent explanation for its actions raises an inference that the real reason for its conduct is not among those asserted. *Resolute Realty Management Corp.*, 297 NLRB 679, 687 (1990); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

This failure of consistency extended even to the hearing. For example, it is not clear whether Respondent was laying off employees due to an economic downturn or terminating employees because they were considered to be poor or marginal employees. As to lay-offs, Respondent did not oppose any applications for state unemployment compensation filed by laid off employees. Moreover, the testimony of Dana Weber covered in excruciating detail the sudden economic problems faced by Respondent prior to the layoffs. As to terminations, I have already described Respondent's policy prohibiting the re-hiring of any laid-off employee. Moreover, Robinette and other witnesses covered alleged transgressions of various alleged discriminatees to justify their lay-offs. Under Respondent's disciplinary system, the accumulation of 12 points within a certain period of time means automatic dismissal. An employee can also reduce his points by improving his performance over a period of time. One or more alleged discriminatees reached 11 points, but then apparently improved their performance to Respondent's satisfaction.

One factor, which I assign no weight to, is the employment of new employees beginning in the spring of 1999 to work in SW Tube and elsewhere. Generally, when seasoned employees are replaced by new employees, this is a factor supporting an illicit motive. *Denholme & Mohr, Inc.*, supra, 292 NLRB at 67 of J.D.; *NLRB v. Foodway of El Paso*, 496 F.2d 117, 119-120 (5th Cir. 1974). Here, however, Respondent's apparent policy of long duration of not recalling laid-off employees precludes the assignment of any weight to this factor.[15]

A second factor to which I assign little or no weight is the abrupt nature of the layoffs. In this regard, I assume without finding that the testimony of Dana Weber is sufficient not only to establish that which was not contested in the first place, that Respondent's competition both national and international coupled with a sudden and precipitous decline in the market for Respondent's products required the 53-employee layoff (R. Exhs. 156, 157). Dana Weber was corroborated by Respondent's vice president for operations, Tom Lewis, a 17-year employee, and Respondent witness. A full-time employee at Respondent's facility in Pennsylvania beginning in 1994, Lewis was suddenly recalled in September to work on the layoffs and restructuring required by the economic crisis. Don Holder, Respondent's director of human resources, also provided corroborating testimony on this point.

So up to this point, Respondent has managed to give a good account of its evidence, blunting certain incriminating factors such as timing and eliminating other factors. The case might be a close case except for a group of five former Respondent supervisors whose combined testimony, in my opinion, presents an insurmountable barrier to Respondent. I call this group, the "gang of five."

b.

The General Counsel began with Harvey Whittenburg, an employee between April 1973, to October 1996, when he was terminated for what he claimed were unknown reasons. At the time of his termination Whittenburg was a corporate director and prior to that he had been plant manager. In fact he was part of Respondent's management for all his tenure, save for the first 2 years. Based on his attendance at various management meetings over the years, Whittenburg testified that Bill Weber was very adamant; anyone involved in union activity would lose their jobs. Whittenburg described two past union organizing drives, one in the mid-1980's and the other in the early 1990's, where Bill Weber orchestrated the lay-offs of union supporters. In the earlier campaign, the names of union supporters were placed on a blackboard list. In the later campaign, Whittenburg was told to go out and try to get rid of union supporters. At this point Bill Weber held a meeting after union flyers had been distributed in Respondent's driveway and repeated that anyone involved in union activities would lose his

[13] There was also evidence that Bill Weber referred to certain employees as "troublemakers," another term which the Board has found means "union supporters." *Monfort of Colorado*, 298 NLRB 73, 74 (1990), enfd. in relevant part, 145 LRRM 2923 (10th Cir. 1994).

[14] In a case like this, reliance on subjective impression is also evidence of an illicit motive. *NLRB v. Centra*, 954 F.2d 366, 374 (6th Cir. 1992).

[15] Notwithstanding my decision on this point, Respondent's former classification of "trainer," and about 12 employees in that classification before the restructuring indicate that Respondent's employees had a level of skill not easily replaced. Furthermore, Respondent's alleged policy of viewing transfers as disfavored is not convincing.

job or Bill Weber would close the plant down. Managers were instructed to lay off employees using a criteria of attendance, and other objective factors and then work in the union supporters from a list supplied by Holder.

According to Dana Weber, Whittenburg's job performance declined for the last 2 years of his employment. He refused to accept other positions, although when he finally left, Dana Weber provided several positive references. All of Respondent's witnesses denied the existence of prior union campaigns and Bill Weber specifically denied the statements attributed to him by Whittenburg. I find that Whittenburg's testimony must be viewed with great caution and scrutinized carefully.

A second witness called by the General Counsel is Larry O'Brien, a Respondent employee between June 1993, and October when he was laid off from his job as quality assurance manager. O'Brien's testimony begins in the summer when managers received information of union activity resumption. According to O'Brien, General Manager Bill Obermarck told supervisors to find out the extent of union activity and report back to him (Obermarck did not testify in this case). Eventually at manager meetings the names of 25 to 30 union supporters were placed on a white board in the meeting room. These names included many of the remaining alleged discriminatees in this case such as Schooley, Rogers, Morris, Teague, and Leasman. O'Brien recalled that Robinette had questioned how Richard Teague and Leasman could have been hired because they are respectively, brother and brother-in-law to Jim Teague, a union organizer who was handbilling at Respondent on August 19. O'Brien also recalled how in the meetings during this period, certain departments were identified as having a high concentration of prounion employees, such as maintenance, tool and dye, and cold draw.

A third former supervisor was James Kash, an employee between, August 1993, and March 1999 when he resigned as director of quality assurance. Kash had also worked for a few years as general manager of Respondent's SSCM facility. Kash described a management meeting on October 6, which Bill and Dana Weber attended for a while. When they left, Robinette provided Kash and other managers with a list of 50 to 55 names of employees to be laid off. During a discussion of those employees on the list, managers made comments about some. For example, someone said Schooley, Rogers, and Leslie were involved with the Union and Leslie had a union sticker on the back of his motorcycle. Other comments were made about employees' attendance, work habits, or attitude. Apparently there was some trading going on with respect to those employees not thought to be union supporters. Some names were deleted and others added. According to Kash, before he left, Bill Weber said that anyone removed from the lay-off list would be the responsibility of the managers for that department. Weber denied making this remark.

When Kash resigned he wrote a letter to Lewis giving the reason for his departure as a difference of opinion over policy (R. Exh. 163). According to his supervisor at the time, Respondent witness John Bayless, Kash was having trouble in performing his assigned tasks.

The General Counsel's fourth former supervisor was Bill Nance, a Respondent employee between July 1997, and January 1999, when he was laid off. Nance had been the general business manager of the cold draw operation. In August, Nance began to attend management meetings in the conference room where Robinette and Holder described the cold-draw department as a "hot bed for union activity." Nance also described the October 6 meeting and generally corroborated Kash's account as to the existence of a lay-off list. Schooley was described as having a black mark against him for being a union organizer and Lewis added, "he's out of here." Others were described as union sympathizers: Rogers, Morris, Ruckman, O'Connell, Teague, and Williams. Supposedly Leasman was described by Holder as a union plant.[16] To the extent he was familiar with the names of employees on this list, Nance said the job performance of most was fairly good but in any event, job performance was not discussed as the reason they were on the list. Based on his observation, Nance thought some employees targeted as union sympathizers were innocent of the charge.

Dana Weber described Nance as an unsatisfactory employee who was not getting the job done. Lewis also described Nance as not having a clue about what was going on.

The final General Counsel witness in this category was Robert Krevett, an employee between January 1997, and November when he was terminated. Krevett had been the personnel manager for SW Tube and attended the August management meeting referred to above. He recalled Robinette's comment deploring the hiring of Richard Teague and expressing concern that he was a union plant. Krevett testified that at this meeting, Robinette told participants that if an opportunity presented itself to get rid of the union sympathizers, the company should do it.

According to Dana Weber, Krevett was fired because of an unacceptable philosophy of personnel management, which involved the showing of favoritism, inability to resolve a sexual harassment problem, and workmen's compensation difficulties. In fact, he was so bad, that when told he would be fired, he wept in the presence of Dana Weber, apparently thereby confirming his incompetence, in her eyes.

A fair summary of the evidence presented by the "gang of five" is to present irrefutable evidence of Respondent's unlawful motive in targeting union supporters to be laid off. With the partial exception of Whittenburg, I credit these witnesses over all of Respondent's witnesses who denied making the remarks attributed to them. I also find that Respondent equated support for the union as a negative, which deserved employee's layoff. The witnesses are generally independent and mutually corroborating and despite certain unlikely aspects, for example discussing Leasman at an October meeting when he had been terminated in August, I believe their testimony. In so finding, I have considered that each could have a motive to fabricate. But when taken together there is just too much evidence to disbelieve.[17]

[16] By this time of this meeting, Leasman had been terminated for about 6 weeks.

[17] Respondent's contentions regarding the "gang of five" (Br. pgs. 32–40), is not convincing.

c.

I turn briefly to the alleged discriminatees remaining in this case. Robert Leasman was hired in late July and terminated on August 24. Originally hired as a "temporary," he worked for 2 weeks until a hiring official returned from a vacation. At this time he was made permanent. On August 19, Leasman was driving out of work in his rather prominently decorated truck, which contained the name of his auto repair business, when he stopped to talk with and receive a union handbill from Jim Teague to whom he was related. That night he attended the union meeting mentioned in the handbill. On August 24, his supervisor Frank Casey, who did not testify, told him, without explanation, that his services were no longer required.

When terminated, Leasman was a probationary employee. However, this fact does not immunize Respondent's decision from scrutiny. *Caguas Asphalt, Inc.*, 296 NLRB 785, 785–786 (1989). But see *Parker Seal Co.*, 239 NLRB 1023, 1026 (1978). Besides accepting the flyer and attending the union meeting, Leasman had another strike against him, he was Jim Teague's brother-in-law and former supervisor O'Brien credibly testified that Robinette made a critical comment about him for this reason (Kash also claimed to have recalled a similar comment made by Robinette at a meeting on October 6, but by this time Leasman was long gone and I do not credit this part of his testimony).

At hearing, Respondent established that several others received union handbills and some of these recipients also attended the union meeting that night, but none of them experienced immediate terminations, although many were laid off on October 7. Leasman was the only employee on probation and I find that he was perceived to be the most vulnerable because of his status. I find that Respondent was aware of his protected activities based on the surveillance of Dye. In the absence of any credible explanation for his abrupt termination, I find that he was terminated in violation of Section 8(a)(3) of the Act.[18]

As to the others, I find that all engaged in union activities primarily in early 1997 when the union campaign began. Respondent singles out Charley Casey as one who never engaged in union activities (Br. p. 10). I find that he signed a union card on May 20, some several months before his lay-off. I cannot account for Casey's signing of a card at this time and there is no direct evidence that Respondent was aware of Casey's union activities; however, the following circumstantial evidence is very convincing. Respondent witness, John Bayless, Director of Maintenance and Engineering and Casey's boss, desired to fire Casey in 1996 for failure to perform his job adequately based in part on his illiteracy. Casey sought and received the personal intervention of Bill Weber with whom he had some sort of personal relationship due to the former's 26-year tenure with the company. Bill Weber prevented Casey's termination on condition that Casey learn to read and write by working with a personal tutor paid for by the company and working in part on company time. Casey quit this program after 2 months without achieving its objective. Yet he continued working, apparently under the protection of Bill Weber until October 7, when Weber gave permission to include Casey on the lay-off list. This shows me that animosity toward the union trumped any personal relationship.[19]

Richard Teague, like Leasman, was related to union organizer Jim Teague and was blackballed for that reason. I agree with General Counsel (Br., p. 21), that the names of Schooley, Rogers, Morris, Martin, Ruckman, and O'Connell were mentioned by the "gang of five" as being on a list, identified as prounion. This is probative evidence of Respondent's motive, if not dispositive. See *Jet Star, Inc.*, 328 NLRB 580, 583 (1999).

Respondent offered evidence that the alleged discriminatees were marginal employees and guilty of having a bad attitude. Respondent uses a number of different forms to evaluate its employees such as reviews, consultations, and formal evaluations. Each of these forms prepared on a regular schedule has a number of subsections, which frequently rated a subject good in one area, deficient in another. Many of these forms were offered by Respondent in support of its defense (R. Exhs. 15–70, 72–75, 164–165). General Counsel offered similar documents on the alleged discriminatees (see e.g. GC Exhs. 2–20), apparently to show the alleged discriminatees were not so bad after all. The fact is for even the worst alleged discriminatee, certain sections support the General Counsel's theory; for even the best-alleged discriminatee, certain sections support Respondent's theory. Those employees among the 53 laid off, who are not claimed to be alleged discriminatees also had records, which could be argued from either side. For good measure, my attention is also called to those employees not laid off who in some cases had equally inconsistent records (GC Exh. 37, 38–119). The result of this tidal wave of reports, evaluations, reviews, and disciplinary write-ups is in my opinion, inconclusive.

This still leave more than ample evidence to find in favor of the General Counsel. To be more specific, I find that Respondent has failed to rebut the General Counsel's strong prima facie case as to Gary Schooley, Jerry Rogers, Roy Morris, Shawn Wilson, Richard Teague, Terry Ruckman, Eric Martin, Charlie Williams, Bryan O'Connell, and Charley Casey. All engaged in union activities. Based on direct and circumstantial evidence, Respondent was aware of these activities. Respondent's animus is undeniable, and they were all laid off. See *Garvey Marine,* 328 NLRB 991 (1999) (Respondent failed to meet "formidable" burden of showing that it would have taken disciplinary action against employees regardless of their union activities). *American Wire Products,* 313 NLRB 989 (1994) (mass discharge of union supporters unlawfully motivated); *Hoffman Plastic Compounds*, 306 NLRB 100 (1992) (during valid layoffs for economic reasons, Respondent discriminatorily selected union supporters to be included in group to be laid off).

In sum, Respondent's action removed the principal union supporters from the plant just as Bill Weber vowed to do in the

[18] Leasman was also held accountable for the union activities of his relative, Jim Teague. *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1089 (7th Cir. 1987).

[19] It appears to me that Bill Weber condoned the failure of Charley Casey to improve himself, and therefore Respondent may not thereafter rely on that alleged misconduct as a basis for discharging Casey. *Virginia Electric & Power Co.*, 262 NLRB 1119 , 1126 (1982).

past. To the extent, some less prominent union supporters remain; and to the extent employees neutral or even opposed to the union were included, the General Counsel's case remains unaffected. See *Birch Run Welding & Fabricating, Inc.*, 761 F.2d 1175, 1180 (6th Cir. 1985). I find that Respondent violated Section 8(a)(3) and (1) of the Act by the layoffs of those named above.

9. Alleged violations of Section 8(a)(4)

As to Schooley, Ruckman and Williams, the General Counsel also contends they were selected for layoff because they participated in the prior Board hearing. The purpose of Section 8(a)(4) is to assure an effective administration of the Act by providing immunity to those who initiate or assist the Board in proceedings under the Act. *General Services, Inc.*, 229 NLRB 940, 944 (1977). Despite the Board's "liberal approach" in order to fully effectuate the section's remedial purpose (Id., p. 941), I find that the General Counsel has failed to prove a violation here. Dana Weber credibly testified that after the prior hearing was completed, she held a managers meeting and told those in attendance that they were to put the case behind them as there was work to be done. Managers were also told to spread the word that there would be no retaliation against pro-union employees, witnesses and others by managers or by anti-union employees. The General Counsel witness and former supervisor Krevett corroborated Dana Weber on this point. Indeed, until the start up of union activity in the summer, that message appeared to take hold. So in a strange and curious way, Respondent's defense to this charge is that in laying off the three alleged discriminatees, it was motivated not by their participation in a prior Board hearing, but by their status as union supporters, thereby violating a different section of the Act. I find no merit here and recommend this allegation be dismissed.

10. Alleged waiver of rights against respondent

Respondent has timely raised an affirmative defense involving the severance agreements/releases. Of the 10 discriminatees in this case, only 2, Eric Martin and Charley Casey executed these documents (R. Exhs. 76, 77 (Martin) and 92, 93 (Casey). The issue is whether these severance agreements were effective to bar Martin and Casey from the relief they are entitled to under this decision. Respondent's brief on this point was submitted midhearing and is contained in the record (R. Exh. 94(a)).

According to Respondent, it attempted to lessen hardship to those, which Respondent was forced to lay off to remain competitive, by offering sums of money pursuant to a severance agreement. Under this agreement, the subject employee agreed to release Respondent from a claim or liability, including any claims under the Act. Respondent claims the current ULP case arose when the subject employees breached their agreement (This alleged breach did not bar Respondent from entering into private settlement agreements with many alleged discriminatees who signed the severance agreements). Respondent bases the thrust of its argument on *Hughes Christensen Co.*, 317 NLRB 633 (1995).

In *Hughes Christensen*, the Board held that the validity of the severance agreements should be governed by the same standards as private non-Board settlements under *Independent Stove Co.*, 287 NLRB 740 (1987). Using that analysis, the Board found the severance releases were effective and the complaint was dismissed.

I will engage in the same analysis mandated by the Board, find the facts in *Hughes Christensen* to be distinguishable and reach a contrary conclusion:

(1) Whether the parties have agreed to be bound by the position taken by the General Counsel. In this case, neither the Union (Charging Party here) nor the General Counsel was ever noticed nor did they agree to be bound. At page 635 of *Hughes Christensen*, the Board noted that the Union was not a party to the severance agreement, but the Board held that factor is outweighed by other factors. I am bound by the Board's view, of course, but I cannot understand how an employee could waive the rights of the nonparty union. In *American Broadcasting Co.*, 290 NLRB 86, 88 (1988), the Board discussed under what conditions a union could waive the rights of employees. Such waivers are disfavored and there must be clear and unmistakable evidence of the union's intention to give up an employee right. Surely an employee's waiver of union rights must met the same high threshold, particularly in a case like that pending at bar, where the union has important institutional rights to vindicate, such as its right to prove to its supporters that an employer may not frustrate its organizational campaign by terminating its supporters. Such rights as these should not be waivable by the whim or caprice of an impoverished employee whose hardship was created by the unlawful acts of the employer.

In *Hughes Christensen Co.*, the General Counsel opposed the agreement. However, at the time the agreements were signed, the charges filed on behalf of the alleged discriminatees had been dismissed by the Regional Director and had not yet been reinstated by the General Counsel, so this factor affected the Board's calculus as to the risks inherent in litigation and the stage of litigation. In the instant case, the Union's first charge was filed on October 8 alleging the unlawful terminations of Morris, Rogers, Schooley, White, Stephenson, Wilson, and Richard Teague (GC Exh. 1(a)). Martin signed his agreement on October 7 (R. Exh. 76) and Casey signed his on November 3 (R. Exh. 92). So for Martin no case even existed and for Casey, the case was still in the investigative stages, major points of departure from *Hughes Christensen*.

(2) Another significant difference concerns the Respondent's history. Unlike the Respondent in *Hughes Christensen*, Respondent here has a history of violating the Act. Moreover, there is a nexus between the prior violations and those found here which, in my view, further strengths the General Counsel's argument.

(3) To be sure, Martin and Casey were advised to consult an attorney, were given a period of time to agree to the severance agreement plus another period of seven days to revoke or rescind after signing, all like those releases found valid in *Hughes Christensen*.[20] However, I find the difference outweigh the similarities and *Hughes Christensen* does not apply to the pre-

[20] I assume without finding that these and other relevant consideration are adequate to show lack of coercion or duress.

sent case. Inexplicably, no party to this case has cited the later Board decision of *Weldun International, Inc.*, 321 NLRB 733 (1966), enfd. in relevant part, unpublished order, Docket #97-5272 (6th Cir. 9/16/98). In that case, the Board held (p. 734), that Respondent had failed to demonstrate that it would have permanently laid off 29 employees, absent the union campaign. At page 734, footnote 6, the Board distinguished *Hughes Christensen* for the same reason I do, above, because the case was in the investigative phase and had not been dismissed (at p. 754 of the J.D. the judge deals with the question of the Charging Party Union not being a party to the severance agreements, a point that the Board did not take up).

Both *Weldun International Inc.*, fn. 6 and a still later case, *Krist Oil*, 328 NLRB 825 fn. 3 (1999) leave to the compliance stage of the proceeding, the question of the effect that the amounts received shall have on these employees backpay awards. I will do the same.[21] For now, I find that Respondent has failed to prove its affirmative defense and as to Martin and Casey, the severance agreements/releases are null and void.[22]

11. Alleged bar of certain allegations by Section 10(b) of the Act

In GC Exh. 1(n)), the General Counsel sought to amend the complaint to add (to par. 6(b)) Casey, Williams, and O'Connell as alleged discriminatees terminated on October 7, in violation of the Act. The General Counsel also sought to add Schooley, Ruckman, and Williams as alleged discriminatee in par. 6(d) in violation of Section 8(a)(4) of the Act, an allegation, I have found without merit above. A second notice to amend is found at G.C. Ex. 1(q), which amends par. 5 of the complaint to allege threats of unspecified reprisals by supervisor Mark McIllivain, a violation I found above, and unlawful videotaping by Robinette and threats by supervisor Ronnie Cole, two allegations I found to be lacking in merit above.

In addition to the McIllivain allegation, I found merit to the Schooley, Williams, and Casey amendment. I allowed the amendment at hearing with the understanding I would re-examine the issue in my decision. I now re-affirm my decision made at hearing.

A statute of limitations defense is an affirmative defense and the initial burden of proceeding with an affirmative defense rests with Respondent. *Silver State Disposal Service, Inc.*, 326 NLRB No. 25, slip op. p. 2 (1998). I find here that Respondent has failed to meet its burden of proof. I begin with *Burlington Times, Inc.*, 328 NLRB 750, 751–752 (1999), citing *Redd-I, Inc.*, 290 NLRB 1115 (1988), where the Board instructed that any amendment of the complaint must be closely related to an allegation contained in a timely filed charge. As further contained within, *Redd-I, Inc.*, the Board looks to (1) whether the new allegations involve the same legal theory as the allegations in the charge; (2) whether the allegations arise from the same factual situation or sequence of events as the allegations in the charge; and (3) whether a Respondent would raise the same or similar defense to both allegations.

I have already referred to the original charge (GC Exh. 1(a)) filed on October 8 and alleging the unlawful termination of certain employees. The amended charge (GC Exh. 1(c)) filed on December 29 alleges an unlawful course of conduct by Respondent including interrogations, restrictions on communications regarding unions, threats, and other coercive activities.

Extended discussion is not warranted. Surely it is evident that in the allegations found to here merit, the same legal theory is present, arising out of the same factual situation or sequence of events and Respondent raises the same defense; a straight denial of the allegation.

Accordingly, I find that amendments are closely related to the original charge and are predicated on the same legal theory. *Epic Security Corp.*, 325 NLRB 772, 775 fn. 13 (1998), citing *Nickles Bakery of Indiana*, 296 NLRB 927, 928 fn. 5 (1989); *Sonicraft, Inc. v. NLRB*, 905 F.2d 146, 148–149 (7th Cir. 1990).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by its Supervisor Harmon interrogating employee Schooley about his union activities; by its supervisor McIllivain threatening employee O'Connell with unspecified reprisals; by its supervisor Conn restricting employees discussions about the union on non-worktime in a de facto breakroom and on worktime when employees were permitted to discuss other subjects, but not the union; and by Conn interrogating Rogers about his union activities.
4. Respondent violated Section 8(a)(3) and (1) of the Act by terminating employee Robert Leasman and by laying off Gary Schooley, Jerry Rogers, Roy Morris, Shawn Wilson, Richard Teague, Terry Ruckman, Eric Martin, Charlie Williams, Bryan O'Connell, and Charley Casey.
5. Respondent has failed to prove its affirmative defenses that two employees waived their right against Respondent by signing severance agreements/releases and that certain amendments to the complaint are barred by the statute of limitations.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having also found that the Respondent unlawfully terminated one employee and laid off others, I shall recommend that the Respondent be required to reinstate them immediately to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or to any other rights or privileges previously enjoyed, dismissing if necessary any person hired after October 7, 1998, and make the employees whole for any

[21] At p. 61 of its brief, Respondent asserts that Schooley returned to work for 1 day and quit and Leasman never showed up at all, both having been reinstated by the 10(j) proceedings. If true, these representations present additional issues for compliance and I express no opinion on these representations at this time.

[22] At pgs. 4–7, R. Exh. 94(a), Respondent discussed its view of whether the severance agreements are valid under Federal law and Oklahoma law. I see no reason to enter into that debate since the agreements are not valid under Board law.

loss of earnings and other benefits suffered as a result of the Respondent's unlawful termination and lay-offs. Backpay is to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In light of Respondent's prior unfair labor practices and the unfair labor practices found here and the serious nature of the violations, I will recommend that a "Broad" Order is warranted on the grounds that Respondent has demonstrated a proclivity to violate the Act and a general disregard for the employees' statutory rights. *Hickmott Foods*, 242 NLRB 1357 (1979); *Western Plant Services*, 322 NLRB 183 fn. 1 (1996).

[Recommended Order omitted from publication.]